RECORD AND BRIEFS

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No. 15-1485

IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA, ET AL.,

Petitioners,

v.

THEODORE WESBY, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the DC Circuit

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

District of Columbia police officers arrested for unlawful entry over sixteen individuals, Respondents here, attending a house party. At the scene, guests informed the officers that the party's host, a woman whom they believed to be a lawful tenant, had invited them to the house. That woman confirmed to the officers that she had issued such an invitation. Disputed evidence suggests, however, that one officer later learned that the woman was not a lawful tenant and that the landlord had not authorized Respondents' entry. The questions presented are:

1. Whether the officers were properly denied qualified immunity at the summary-judgment phase because, based on the evidence as construed in Respondents' favor, it would have been clear to any reasonable officer that probable cause for unlawful entry required some evidence that Respondents knew or should have known that their entry was against the will of the lawful occupant or owner, and there was no such evidence.

2. Whether Respondents were properly granted summary judgment because, even when the evidence is construed in Petitioners' favor, the officers lacked probable cause under the Fourth Amendment to arrest Respondents for unlawful entry.

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INTRODUCTION

This case is not about whether police may discredit self-serving statements of someone they suspect of a crime. Respondents and Petitioners both agree that, when the circumstances reasonably give them a basis, police may do so. Nor is this case about whether police may rely on circumstantial evidence to establish probable cause for an arrest. Respondents and Petitioners, again, both agree that they may.

Instead, this case is about whether, in the particular circumstances here, the police had a basis to disregard Respondents' particular statements. It is about whether the particular circumstantial evidence available to the officers here was evidence that Respondents committed unlawful entry. The answer to these very specific questions is no. In the unique circumstances presented here—and particularly when the evidence is viewed in the light most favorable to Respondents, as is required on Petitioners' motion for summary judgment—a reasonable officer could not discredit Respondents' statements and could not conclude that there existed probable cause to arrest.

Given the clarity of the law at the time of the arrests, a reasonable officer would have known both that probable cause requires some evidence on every element of a crime and that one element of the crime of unlawful entry is that the arrestee know or should know he is on property against the will of the owner. A reasonable officer would have concluded that he lacked *any* evidence that Respondents knew or should have known they were on property against the owner's will. Indeed, the evidence against

Respondents was simply that they were guests at a lawful (though bawdy) house party, in an inelegantly furnished home, and that they partook in the party festivities. There was disputed evidence that their host's lease negotiations had stalled, but there was no basis to conclude Respondents knew or should have known that. This is not evidence of knowing trespass. The Court should therefore affirm the judgment in Respondents' favor, or at minimum affirm the denial of qualified immunity to Petitioners and remand for trial to resolve the disputed factual issues.

STATEMENT OF THE CASE

A. Factual Background.

Petitioners seek review of the parties' cross-motions for summary judgment, and so the record shifts as each side's motion is alternately considered.

On review of Petitioners' motion, the following facts are taken as true: On Saturday, March 15, 2008, Respondents attended a house party in River Terrace, a low-income, predominantly African-American neighborhood in Washington, D.C. J.A. 112. The police arrived at the house, located at 115 Anacostia Avenue, N.E., in the early morning hours of March 16. J.A. 112, 189. They knocked on the front door, and the partiers opened it. J.A. 143. The police entered to find a number of partiers sitting on chairs or standing around in the living room, listening to music on the stereo at a low volume, and drinking. J.A. 37, 96-97, 114, 165; C.A. App. 82. There were strippers. J.A. 37, 115. When the police explored the rest of the house (with guns drawn),

they found other partiers hanging out in a bedroom, eating and talking. J.A. 46-50, 96, 177.

The house was furnished (if inexpensively). Apart from the chairs and stereo in the living room, there was a bed in the bedroom, shades on the windows, a fully supplied bathroom, and food in the refrigerator. J.A. 41; C.A. App. 82. There were candles set out, a few lights on, and normal plumbing. J.A. 45, 52, 96. The house looked like someone had moved in recently, as indeed the host had. J.A. 35-36, 41.

When the police asked the partiers why they were present, they explained that a woman called Peaches (who also went by Tasty) was hosting a party in the house, and that they were there at Peaches' (or her guests') invitation. J.A. 36, 53, 97, 131, 135, 165. Peaches had gone to the store, but the police contacted her by phone. J.A. 165. Peaches confirmed to the officers that she had invited the partiers and explained that that she was the lawful tenant of the house. J.A. 53-54, 100. She also gave them the contact information of Damien Hughes, the personal representative of the deceased owner of the house (Henry Hughes). J.A. 105; C.A. App. 68, 91-94. The police nonetheless arrested everyone for unlawful entry. J.A. 75-76, 100.

In short, on Petitioners' motion for summary judgment, Respondents were arrested simply for attending a typical (albeit licentious) house party.

Petitioners' narrative of the events adds a number of disputed facts, which are taken as true *only* on review of Respondents' motion for summary judgment. These facts are: The police came to the house after receiving a tip that there were

unspecified "illegal activities" going on inside, that there was loud noise, and that the house was supposed to be vacant. J.A. 94, 98-99, 111-12, 131. When the police arrived at the house and knocked on the front door, an officer saw some people inside scatter. J.A. 143. Upon entering the house, the officers smelled marijuana and found opened condom wrappers. J.A. 97, 112, 131, 165. The house was in disarray. J.A. 112. An officer reported finding someone hiding in a closet. J.A. 177.[1]

When the police spoke with Peaches by phone, she confirmed that she had invited Respondents to the house, and that she had permission to be there because she was renting it. J.A. 53, 100. But she later admitted that she did not have permission. J.A. 54. Peaches then put the police in touch with Hughes, who told them that Peaches lacked permission to live in the house or to invite others to party there. J.A. 99-100, 105-06, 165-66. He reported that, although he and Peaches were trying to work out a lease, they had not yet reached an

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[1] One officer also testified that he was told by an unidentified person that another unidentified person was selling sex upstairs. J.A. 73-74. Given that this officer never went upstairs, the officers who did go upstairs reported nothing like this, the police report makes no mention of such an allegation, and Petitioners never considered arresting Respondents for prostitution, J.A. 73-74, 112, this vague, second-hand report is too fantastical to credit even on Petitioners' motion for summary judgment. *See, e.g.*, *United States v. Davis*, 809 F.2d 1509, 1513 (11th Cir. 1987) (noting that where evidence is "so fantastic, so internally inconsistent, or so speculative[,] it ha[s] no probative value" and is "insufficient to present a question for the jury").

agreement. J.A. 99. The police then arrested Respondents. J.A. 166.

B. District Court Proceedings.

Respondents (sixteen arrestees) sued Petitioners (the District of Columbia, Officer Andre Parker, and Officer Anthony Campanale), alleging that the officers lacked probable cause to arrest and asserting claims for false arrest under 42 U.S.C. § 1983 and related common-law claims. Pet. App. 6a. Respondents moved for partial summary judgment on probable cause, and Petitioners cross-moved on both probable cause and qualified immunity grounds.

On probable cause, the district court granted judgment to Respondents. It concluded that, to commit unlawful entry, a person must know or have reason to know that he is on another's property against that person's will. And because Petitioners were aware that Peaches had invited Respondents to the house, Petitioners had no basis to conclude that Respondents knew or should have known they were present against the owner's will. Pet. App. 64a.

On qualified immunity, the district court denied Petitioners' motion. Although Petitioners had argued that the law was unclear on the elements of unlawful entry, the court disagreed: "For many decades preceding these arrests, District of Columbia law has consistently provided that probable cause to arrest for unlawful entry requires evidence that the alleged intruder knew or should have known, upon entry, that such entry was against the will of the owner or authorized agent." Pet. App. 74a. The court also held that it was unreasonable for Petitioners Parker and Campanale to rely on their superiors' orders,

since Petitioners knew Peaches had given permission to enter the house. Pet. App. 78a.

The case proceeded to a damages-only trial, and the jury awarded Respondents $680,000 in damages. Pet. App. 121a. Petitioners appealed. C.A. App. 515.

C. Court of Appeals Proceedings.

The court of appeals affirmed. On probable cause, the panel agreed with the district court that the crime of unlawful entry has a *mens rea* requirement (that the trespasser know or have reason to know he is present against the owner's will). And it agreed that the officers had an insufficient basis to conclude that Respondents had that mental state, given the undisputed evidence that Peaches had invited them to the house. Pet. App. 11a. As the court put it, "the evidence is uniform that the arrestees all were invited, and there is simply no evidence in the record that [Petitioners] had any reason to think the invitation was invalid." Pet. App. 12a.

On qualified immunity, the court of appeals found that "controlling case law in this jurisdiction . . . made perfectly clear at the time of the events in this case that probable cause required some evidence that [Respondents] knew or should have known that they were entering against the will of the lawful owner." Pet. App. 23a-24a. And because the evidence was uncontroverted that Respondents had a basis to believe they had entered at the invitation of a lawful occupant, "no reasonable officer could have believed there was probable cause to arrest [Respondents]." Pet. App. 22a. Judge Brown dissented. Pet. App. 32a. Petitioners unsuccessfully sought rehearing en banc. Pet. App. 104a.

SUMMARY OF ARGUMENT

I. Petitioners' motion for summary judgment on their qualified immunity defense was properly denied. Precedent at the time of the arrest clearly established that probable cause requires some evidence of every offense element, particularly a state-of-mind element, and that the District of Columbia's unlawful entry statute includes such a state-of-mind element. Thus, in the circumstances here, viewed in the light most favorable to Respondents as required, Petitioners could not reasonably have concluded they had probable cause to arrest for unlawful entry.

Well-worn Fourth Amendment principles establish that probable cause requires a factual basis for concluding that a crime has been committed, which requires at least some evidence supporting each element of a crime. This Court has never approved an exception to this rule for "on-scene" officers. To the contrary, the probable cause inquiry is, if anything, *more* stringent when on-scene officers make a warrantless arrest than when a neutral magistrate issues an arrest warrant. And there is no basis for treating *mens rea* differently from other elements of a crime. Because a culpable mental state is the defining attribute of criminal behavior, courts have singled out evidence supporting *mens rea* as particularly necessary to probable cause.

Settled law in the District of Columbia has also established that the crime of unlawful entry has a *mens rea* element. One must know or have reason to know that he is on property against the will of its lawful occupant or owner to violate the law. This *mens rea* requirement is an element of unlawful entry, not an affirmative defense.

To arrest for unlawful entry, therefore, Petitioners were required to have at least some evidence that Respondents knew or should have known that they entered the house against the will of the lawful occupant or owner. It would have been obvious to any officer aware of these legal principles that he lacked probable cause to arrest Respondents. Construing the record in favor of Respondents, the factual basis for their arrest was simply that they were invited guests at a standard, though debauched, house party in a cheaply furnished house in a poor neighborhood. Certainly Petitioners are entitled to point to circumstantial evidence in the probable cause inquiry. But whatever the form of the evidence, it must provide an affirmative basis to conclude that someone committed a crime. The evidence here does not.

II. Respondents' motion for summary judgment on liability was properly granted. Even construing the record in Petitioners' favor, as required on Respondents' motion, Petitioners lacked probable cause to arrest. Viewing the record in this light does not change the fundamental character of the evidence: Respondents came to a party, and it turned out the host of the party failed to finalize a lease with the landlord. Absent reason to conclude that Respondents interrogated (or should have interrogated) their host about her leasing arrangements, as the police ultimately did, there remains no basis to conclude Respondents satisfied the unlawful entry statute's *mens rea* requirement. Accordingly, Respondents were entitled to summary judgment on liability, and this Court should affirm.

At a minimum, however, this Court should remand for trial. Petitioners' cross-motion for summary judgment relies on a host of disputed facts that, when resolved in Respondents' favor, preclude a finding of probable cause.

I. PETITIONERS' MOTION FOR SUMMARY JUDGMENT ON QUALIFIED IMMUNITY WAS CORRECTLY DENIED.

Petitioners ask this Court to enter summary judgment in their favor on qualified immunity grounds, but Petitioners' motion was properly denied.

The qualified immunity "inquiry turns on the objective legal reasonableness of [Petitioners'] action[s], assessed in light of the legal rules that were clearly established at the time [they were] taken." *Pearson v. Callahan*, 555 U.S. 223, 243-44 (2009). To be clearly established there is no need that "the very action in question have previously been held unlawful." *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377-78 (2009). It is sufficient, rather, if "prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." *United States v. Lanier*, 520 U.S. 259, 269 (1997); *accord Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (qualified immunity unavailable where the law gave officers "fair warning" that their conduct was unconstitutional).

Here, given established law, it would have been clear to a reasonable officer that probable cause requires evidence of every element of a crime, including *mens rea* where applicable. It also would have been clear that the crime of unlawful entry in the District of Columbia has a *mens rea* element.

And it would have been clear that Petitioners lacked evidence that Respondents met the *mens rea* requirement—when viewing the evidence in Respondents' favor, as is required on review of Petitioners' motion for summary judgment.

A. The Law Was Clearly Established That Probable Cause Requires Some Evidence of Every Element of the Crime.

At the time of Respondents' arrests, Fourth Amendment law was clear that probable cause requires *some* evidence on every element of the crime underlying the arrest, and that *mens rea* is no exception.

1. This Court's precedents on probable cause are long-established. The Fourth Amendment protects "the right of the people to be secure in their persons . . . against unreasonable . . . seizures." U.S. Const. amend. IV. As this Court has held, "the general rule" is that an arrest is reasonable under the Fourth Amendment "only if based on probable cause to believe that the individual has committed a crime." *Bailey v. United States*, 568 U.S. 186, 192 (2013). This means that an arrest requires sufficiently reliable evidence supporting the conclusion that the elements of a crime are all satisfied. *See Ex parte Burford*, 7 U.S. (3 Cranch) 448, 452 (1806) (Marshall, C.J.) (arrest warrant was invalid where it "state[d] no offense" and "[did] not allege that [the arrestee] was convicted of any crime").

This proposition would require little explication, except that Petitioners argue that police officers operating in the field should not be required to "sort through the elements of an offense" and evaluate

whether each one is satisfied before making an arrest. Br. 35-36. Petitioners' position is that because the probable cause determination is a "fluid concept," police can arrest a citizen without "identifying every element . . . and weighing the available facts as to each." *Id.* at 35.

Petitioners did not argue below, as they do before this Court, that tethering probable cause to the elements of a crime requires too much of police officers. Nor did Petitioners dispute this issue in their petition for certiorari. Accordingly, this Court should decline to address it. *See* Sup. Ct. R. 14.1(a); *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1009 (2017). In any event, it is contrary to long-established constitutional principles.

While the probable cause inquiry is undoubtedly a "fluid," *Florida v. Harris*, 568 U.S. 237, 244 (2013), "practical," and "nontechnical" inquiry based on the totality of the circumstances, *Brinegar v. United States*, 338 U.S. 160, 176 (1949), that does not alter the basic requirement that probable cause for an arrest requires facts that "warrant a man of reasonable caution in the belief *that an offense has been or is being committed*." *Id.* at 175-76 (emphasis added); *see also, e.g.*, *Manuel v. City of Joliet*, 137 S. Ct. 911, 920 (2017) (holding that the Fourth Amendment prohibits seizures without "probable cause to believe [the suspect] *committed a crime*") (emphasis added); *Henry v. United States*, 361 U.S. 98, 102 (1959) ("Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing *that the offense has been committed*") (emphasis added). And the specified elements of an offense constitute the irreducible

minimum of a crime. *See United States v. O'Brien*, 560 U.S. 218, 224 (2010); *Patterson v. New York*, 432 U.S. 197, 210 (1977). Accordingly, absent at least *some* evidence supporting every element of a crime, there is no probable cause, and an arrest violates the Fourth Amendment.

There is no exception to this rule for "on-scene" officers. To the contrary, police officers making warrantless arrests in the field are held, if anything, to a *more* exacting standard than officers seeking warrants from a judge. *E.g.*, *Aguilar v. Texas*, 378 U.S. 108, 111 (1964) ("[W]hen a search is based upon a magistrate's, rather than a police officer's, determination of probable cause, the reviewing courts will accept evidence of a less judicially competent or persuasive power than would have justified an officer in acting on his own without a warrant."); *Whiteley v. Warden, Wyo. State Penitentiary*, 401 U.S. 560, 566 (1971) ("[T]he standards applicable to the factual basis supporting the officer's probable cause assessment at the time of the challenged arrest . . . are at least as stringent as the standards applied with respect to the magistrate's assessment."); *Wong Sun v. United States*, 371 U.S. 471, 479 (1963) (similar). Arrest pursuant to a warrant is preferable, *United States v. Ventresca*, 380 U.S. 102, 106 (1965), and application of a less exacting standard for warrantless arrests "would discourage resort to the procedures for obtaining a warrant," *Whiteley*, 401 U.S. at 566.[2]

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[2] Moreover, because the probable cause standard cuts across the criminal justice process, a holding diluting that standard would have far-reaching consequences. For example, it would

In keeping with these principles, this Court has approved warrantless arrests in the field where the facts and circumstances support probable cause for each element of a crime. For example, in *Michigan v. DeFillippo*, 443 U.S. 31, 36-37 (1979), the Court satisfied itself that an arrest pursuant to a municipal ordinance was properly supported by probable cause only after reviewing the elements of the statute and determining that the arresting officer had observed facts satisfying each. *See also, e.g.*, *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (holding permissible a warrantless arrest for driving without a seatbelt because the arresting officer had observed that the statutory offense elements were satisfied).

But this Court has made plain that, where an officer makes a warrantless arrest on the basis of mere suspicious behavior or incomplete information, he violates the Fourth Amendment's probable cause requirement. For example, in *Henry*, this Court found no cause to arrest a man for possessing contraband despite suspicious behavior consistent with the crime. 361 U.S. at 102. Specifically, the police had received a report that liquor had been stolen, and they saw the man, together with someone who had been singled out by a confidential informant, repeatedly park in an alley to load cartons into a car, and later leave a tavern. *Id.* at 99. Yet "there was

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(continued...)

allow law enforcement officials greater latitude in arresting suspects in their homes, *see Payton v. New York*, 445 U.S. 573, 576 (1980), and in imposing lengthy pretrial detentions, *see Manuel*, 137 S. Ct. at 920 & n.8.

nothing to indicate that the cartons here in issue probably contained" *contraband* specifically (an element of the crime), and thus no basis to arrest. *Id.* at 104. "Under our system suspicion is not enough for an officer to lay hands on a citizen." *Id.*

Accordingly, when on-scene officers make a warrantless arrest, they—like a magistrate judge issuing a warrant—must have a factual basis to conclude that a criminal, as opposed to an innocent, act has been committed.

2. The rule that probable cause requires evidence supporting all elements of a crime applies with especial force when the element in question is *mens rea*. It is a deeply-rooted precept that a person is not criminally responsible unless criminal intent accompanies the wrongful act. *Morrisette v. United States*, 342 U.S. 246, 250-51 (1952). Thus, well before the arrests in this case, this Court held that the Government lacked probable cause to arrest for *knowing* possession of a counterfeit coupon in the absence of information at least "hinting . . . at the knowledge and intent required as elements of the felony under the statute." *United States v. Di Re*, 332 U.S. 581, 592 (1948). Evidence on the other elements of the crime was not enough.

Based upon the "ancient requirement of a culpable state of mind," *Morrisette*, 342 U.S. at 250, numerous circuits have followed this Court in holding that probable cause requires some evidence of intent when it is an element. *See Gasho v. United States*, 39 F.3d 1420, 1429 (9th Cir. 1994); *see also Williams v. City of Alexander*, 772 F.3d 1307, 1312 (8th Cir. 2014) ("For probable cause to exist, there must be probable cause

for all elements of the crime, including *mens rea*."); *United States v. Joseph*, 730 F.3d 336, 342 (3d Cir. 2013) ("To make an arrest based on probable cause, the arresting officer must have probable cause for each element of the offense," including *mens rea*); *BeVier v. Hucal*, 806 F.2d 123, 126 (7th Cir. 1986) (holding that, to have probable cause under a statute requiring knowing or willful conduct, officers needed "some evidence" to satisfy this element).[3] Some courts of appeals have even had occasion to apply this principle in the exact context here, holding that evidence of *mens rea* is required to arrest for unlawful entry. *See, e.g.*, *Mitchell v. City of New York*, 841 F.3d 72, 78-79 (2d Cir. 2016); *Hebert v. Maxwell*, 214 F. App'x 451, 455 (5th Cir. 2007).

Petitioners ignore these cases, and instead rely on this Court's opinion in *Maryland v. Pringle*, 540 U.S. 366 (2003). But that case proves Respondents' point. In *Pringle*, this Court held that the police had probable cause to believe that the defendant, who was a passenger in a vehicle, committed the crime of

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[3] Some of these courts have stated that probable cause—rather than simply some evidence—is required on a *mens rea* element. *E.g.*, *Williams*, 772 F.3d at 1312; *Joseph*, 730 F.3d at 342. Assuming there is a meaningful practical difference between a rule that probable cause is required for a given element and a rule that probable cause does not exist absent *some* evidence supporting every element, *cf.* Br. 35 (faulting court of appeals for requiring probable cause "as to each specific element"), Respondents' position is simply that some evidence supporting *mens rea* is needed. This modest proposition is amply supported by this Court's precedents, *see supra* at 11-15, and falls well within these arguably more stringent holdings of the courts of appeals.

knowing possession of cocaine. The Court reached that conclusion not because the police could ignore the *mens rea* element of the statute, but because the police could reasonably infer the defendant had knowledge of the cocaine, given that the cocaine and $763 in rolled-up cash were in the vehicle within his reach. *Id.* at 372. *Pringle* thus stands for the uncontested proposition that evidence of unlawful intent may be either circumstantial or direct. Respondents agree—but no matter the *type* of evidence, probable cause requires *some* evidence of *mens rea*.

3. At the time of the arrest, these legal principles were clearly settled in federal and local courts in the District of Columbia. Indeed, in *United States v. Brown*, the D.C. Court of Appeals held that an arrest for willfully failing to pay taxi fare was "premature" because evidence of "the element of scienter [was] lacking." 294 A.2d 499, 500 (D.C. 1972). Similarly, in *United States v. Christian*, the D.C. Circuit found no probable cause for possessing a dagger with the intent to use it unlawfully because the officers "lacked any evidence at all that [the suspect] intended to use the dagger unlawfully." 187 F.3d 663, 667 (D.C. Cir. 1999); *see also Carr v. District of Columbia*, 587 F.3d 401, 410-11 (D.C. Cir. 2009) (officers lacked probable cause to arrest for knowingly parading without a permit in absence of evidence that defendants knew no permit was issued). Petitioners—who perform their functions within a single jurisdiction and "so are expected to adjust their behavior in accordance with local precedent," *Ashcroft v. al-Kidd*, 563 U.S. 731, 745-46 (2011) (Kennedy, J., concurring)—should have been aware

of this law. These cases reaffirm the longstanding principle that officers cannot arrest absent evidence on every element of the crime, particularly the state-of-mind element.

B. The Law Was Clearly Established That the Crime of Unlawful Entry in the District of Columbia Has a *Mens Rea* Element.

The law was similarly clear at the time of the arrests that the crime of unlawful entry in the District of Columbia has a *mens rea* element: The arrestee must know or have reason to know he is present on someone else's property against that person's will. Petitioners dispute that this was the law—and claim that, in the alternative, they were reasonably mistaken about the statute's elements—but their arguments are controverted by long-established D.C. caselaw.

1. The District's unlawful trespass statute prohibits any person from entering a public or private dwelling "against the will of the lawful occupant or of the person lawfully in charge thereof." D.C. Code § 22-3302 (2007). D.C. courts have long recognized that, "[t]o be against the will of the lawful occupant the entry must be against the *expressed* will." *Bowman v. United States*, 212 A.2d 610, 611 (D.C. 1965) (emphasis added); *accord Leiss v. United States*, 364 A.2d 803, 806 (D.C. 1976).

To express his will, an owner must *explicitly* or *implicitly* warn others that they are unwelcome. For example, in *Bowman*, the owner explicitly manifested his will to exclude "by sign and by public announcement." 212 A.2d at 611. And in *Smith v.*

United States, the owner implicitly warned others to stay out by restricting access to his property with locked gates and a barbed wire fence. 281 A.2d 438, 439-40 (D.C. 1971). But when an owner leaves his property "unmarked or ambiguously marked," he fails to satisfy the statute's warning requirement. *Jackson v. United States*, 357 A.2d 409, 411 (D.C. 1976); *see also Culp v. United States*, 486 A.2d 1174, 1176-77 (D.C. 1985). The unlawful entry statute thus reflects the "traditional[]" American principle that the law of trespass "'punishes persons who enter onto the property of another after having been warned by the owner to keep off.'" *Bean v. United States*, 709 A.2d 85, 86 (D.C. 1998) (quoting *Martin v. City of Struthers*, 319 U.S. 141, 147 (1943)); *see also Bowman*, 212 A.2d at 611 (equating express will with "warning to keep off").

This *mens rea* standard has more recently been described as a requirement that the defendant "knew or should have known" he was entering against the owner's will. *See Ortberg v. United States*, 81 A.3d 303, 308 (2013); *see also* Barbara E. Bergman, *Criminal Jury Instructions for the District of Columbia* § 5.401 (Matthew Bender, Rev. Ed.) (to convict for unlawful entry the jury must find the defendant "knew or should have known that [he was] entering against the [owner's] will"). That is simply another way of expressing the same longstanding rule that the owner must explicitly or impliedly express his will to exclude. *Ortberg*, 81 A.3d at 308. If an owner has warned others to stay away, a defendant will or should know that his entry is unwanted. *See id.* at 305; *see also United States v. Montague*, 75 F. Supp. 2d 670, 671 (S.D. Tex. 1999)

(although unlawful entry laws "often do not contain an express mental state, the element of notice mean[s] that the defendant's entry must have been intentional"). Thus, long-ago-decided "cases make clear that the mental state with respect to acting against the will of the owner or lawful occupant [is] that the defendant knew or should have known that his entry was unwanted." *Ortberg*, 81 A.3d at 308; *accord* Pet. App. 23a-24a.

In requiring evidence of this wrongful state of mind, D.C.'s unlawful entry statute is archetypal. It is a "common requirement" of criminal trespass statutes that "the actor be aware of the fact that he is making an unwarranted intrusion." Wayne R. LaFave, 3 Subst. Crim. L. § 21.2 (2d ed. 2016) (citation omitted); *see also Martin*, 319 U.S. at 147–48 ("We know of no state which ... makes a person a criminal trespasser if he enters the property of another for an innocent purpose without an explicit command from the owners to stay away."). This requirement is a defining feature of criminal trespass—as distinct from civil trespass, for which no mental state is often required. *See* LaFave, 3 Subst. Crim. L. § 21.2 & n.125. The purpose of this ubiquitous state-of-mind element is plain: It serves "to exclude from criminal liability both the inadvertent trespasser and the trespasser who believes that he has received an express or implied permission to enter or remain." Model Penal Code § 221.2, Comment at 88 (1980).

2. Petitioners attempt to muddy this rule in two ways, but neither succeeds.

First, they claim that *mens rea* is an affirmative defense to unlawful entry, not an element of the offense. That argument is both forfeited and wrong.

Petitioners' petition for certiorari did not dispute that *mens rea* is an element of the District's criminal trespass law, or that any reasonable officer would have so known at the time of the arrests. It argued only that the evidence known to the police supported the *mens rea* element. Pet. 11-16. Nor would this Court have granted review on such questions, since the D.C. Circuit is entitled to deference on its interpretation of local law. *See Phillips v. Wash. Legal Found.*, 524 U.S. 156, 167 (1998). The Court should thus decline to consider Petitioners' newly minted argument. *United States v. Ortiz*, 422 U.S. 891, 898 (1975).

In any event, Petitioners' argument is meritless. The unlawful entry statute specifically provides that the crime is committed only when someone enters "against the will" of the person in charge. D.C. Code § 22-3302 (2007). And as discussed above, this means that the owner must *express* his will, such that the trespasser knows or should know the owner's will. The D.C. Court of Appeals has specifically held that its *prior* "cases make clear" that this state-of-mind requirement is an element of unlawful entry. *Ortberg*, 81 A.3d at 308 (citing, *e.g.*, *Artisst v. United States*, 554 A.2d 327, 330 (D.C. 1989); *Smith*, 21 A.2d at 440); *accord* Pet. App. 11a, 23a-24a. It has thus long been established that *mens rea* is an element of the crime that is necessary for its commission, not simply an affirmative defense—as even the Government agrees. Br. of United States 15.

To be sure, courts have often noted that having a bona fide belief in one's right to enter is a "defense" to unlawful entry. But a bona fide belief in a right of entry is simply one way of showing that a defendant lacks knowledge or reason to know of the owner's will. Someone who possesses a bona fide belief of his right to enter, just like someone who enters "unmarked or ambiguously marked premises," lacks knowledge or reason to know he is present against the owner's will. *Jackson*, 357 A.2d at 411; *Smith*, 271 A.2d at 439. The defense therefore precludes *proof* of the *mens rea* element; it does not supplant the *mens rea* requirement. Rather than cast doubt on the existence of a *mens rea* element in the unlawful entry statute, the bona fide belief defense is confirmation that such an element exists.

Moreover, this Court has clearly distinguished between a defense that *negates an element*, and an affirmative defense that simply *excuses* otherwise criminal conduct. *See Smith v. United States*, 568 U.S. 106, 110 (2013); *Dixon v. United States*, 548 U.S. 1, 7 (2006). Although a defendant may be required to bear a burden of production to raise both kinds of defenses, the prosecution must disprove beyond a reasonable doubt a defense that negates an element, whereas a defendant may be required to prove a defense that merely excuses conduct. *Smith*, 568 U.S. at 110; *compare Dixon*, 548 U.S. at 11 (prosecution is required to disprove insanity beyond a reasonable doubt because "evidence that tended to prove insanity also tended to disprove [*mens rea*] element of the offense charged"), *and id.* at 7 (defendant can be required to prove duress because it "does not negate a defendant's criminal state of mind when the

applicable offense requires a defendant to have acted knowingly or willfully"). This distinction arises because "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970).

Here, it is clear that the bona fide belief defense is a true defense to the elements of the crime, not an affirmative defense that excuses conduct. For one thing, although the defendant bears the burden to raise the defense, the prosecution must disprove it beyond a reasonable doubt. *Darab v. United States*, 623 A.2d 127, 136 (D.C. 1993). And if that were not enough, the D.C. Court of Appeals has specifically explained: "[T]he existence of a reasonable. good faith belief is a valid defense precisely because it *precludes the government from proving what it must*—that a defendant knew or should have known that his entry was against the will of the lawful occupant." *Ortberg*, 81 A.3d at 309 (emphasis added); *see also* Pet. App. 11a ("[T]he cases interpreting the unlawful-entry statute are clear and consistent that [the *bona fide* belief] defense is available precisely because a person with a good purpose and bona fide belief of her right to enter lacks the element of criminal intent required by the statute."); *Phillips*, 524 U.S. at 167 (deference to court of appeals on local law). Again, the bona fide belief defense merely reaffirms that *mens rea* is an element of unlawful entry.

This has long been the law. Although the D.C. Court of Appeals' "prior discussions of mental state have lacked some precision," the court recently "look[ed] to [its] precedent to determine" that

knowledge (or reason to know) of the owner's will was an element of the offense—and not simply an affirmative defense. *Ortberg*, 81 A.3d at 307; *accord* Pet. App. 23a-24a. As that court has put it time and again, a person who "enters a place with a good purpose and with a bona fide belief of his right to enter . . . lacks the *element* of criminal intent required" by the unlawful entry statute. *Smith*, 281 A.2d at 439 (emphasis added); *accord* Pet. App. 11a; *see also* Br. of United States 15 n.4 (noting that the requirement that a person "knew or should have known that s/he was entering against [the owner's] will" reflects "decades of case law").

Second, Petitioners claim that, even if an owner's expression of his will is an element of unlawful entry in other contexts, there is an exception to this rule in the context of private dwellings. Br. 37. Not so. D.C. courts have uniformly held that the expressed will requirement also applies to private dwellings. *See, e.g.*, *Artisst*, 554 A.2d at 329; *Bean*, 709 A.2d at 86; *Culp*, 486 A.2d at 1176-77.

The case on which Petitioners rely for the contrary argument, *McGloin*, is no exception. In that case, the arrestee was seen in two "obviously private or restricted" areas of a private apartment building (the roof and fire escape). *McGloin v. United States*, 232 A.2d 90, 91 (D.C. 1967). In such circumstances, the D.C. Court of Appeals held that the express will requirement was satisfied. Despite the arrestee's purported explanation for his presence, it was "plain" that he knew or should have known he was unwelcome. Far from demonstrating that there is no *mens rea* element, this case makes clear that there is one—it simply had been satisfied.

3. Finally, Petitioners claim that the arrest was supported by probable cause—which *a fortiori* entitles them to qualified immunity—because even if they made a mistake of law, their mistake was reasonable. That is incorrect and does not alter the qualified immunity analysis.

Petitioners claim that, at the time of the arrests in this case, they incorrectly believed that unlawful entry had no *mens rea* requirement. Pet. App. 51a, 56a-57a. Relying on this Court's decision in *Heien v. North Carolina*, 135 S. Ct. 530 (2014), they contend that a reasonable officer would have made the same legal mistake, and thus their failure to find evidence of *mens rea* does not negate probable cause.

In *Heien*, this Court recognized that reasonable suspicion, under the Fourth Amendment, can rest on a mistake of law. But "[t]he Fourth Amendment tolerates only *reasonable* mistakes, and those mistakes—whether of fact or of law—must be *objectively* reasonable." *Id.* at 539. The officer's mistake in *Heien* was reasonable because the statutory provision he mistakenly interpreted was genuinely ambiguous and had never been previously construed by the State's appellate courts. *Id.* at 540.

In contrast, the contours of the unlawful entry statute are "clearly identified in words of common understanding, with little room for misinterpretation or conjecture." *Leiss*, 364 A.2d at 806. In the face of fifty years of uniform precedent, it was unreasonable at the time of the arrests for an officer to believe that the accused's mental state was not an element of unlawful entry. Because an "officer can gain no Fourth Amendment advantage through a sloppy

study of the laws he is duty-bound to enforce," *Heien* is of no use to Petitioners here. 135 S. Ct. at 539-40.

C. Under This Clearly Established Law, a Reasonable Officer Would Have Known That There Was No Probable Cause To Arrest Respondents.

It should also have been clear to Petitioners that, in the circumstances here, they lacked probable cause to arrest Respondents. In contending otherwise, Petitioners never acknowledge the applicable standard on review of *their* motion for summary judgment—namely, that the facts are viewed in the light most favorable to Respondents. On this view of the record, there was no evidence—circumstantial or direct—that Respondents knew or should have known they were present against the owner's will.

The officers had affirmative unrebutted and corroborated evidence of Respondents' innocent mental state. Respondents told the police that they were at the house on the invitation of the party's host, Peaches, or her guests, and Peaches confirmed that representation. But even setting aside that exculpatory evidence, Petitioners still lacked grounds to arrest. Probable cause requires affirmative evidence of guilt, not simply the absence of evidence of innocence, and there was no evidence of guilt here. Petitioners knew only that Respondents were at a house party, engaging in common (albeit debauched) party activities, in a cheaply furnished home in a poor neighborhood, and that they neither owned nor rented the house themselves. While this may be evidence of poor taste or poverty, or both, it is not evidence of knowing trespass.

1. In Evaluating Qualified Immunity, All Facts Must Be Viewed in Respondents' Favor.

On review of Petitioners' motion for summary judgment, all factual disputes must be resolved and all favorable inferences must be drawn in favor of Respondents. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Tolan v. Cotton*, 134 S. Ct. 1861, 1863 (2014) (per curiam). Properly construed, the record here establishes the following: In the early morning hours, the police arrived at a house to find a party in progress, with guests drinking and women apparently engaged in exotic dancing for money (a lawful activity). J.A. 37, 96-97, 112, 115. The house was furnished, though sparingly. Some of the guests told the police that the host of the party, Peaches, had invited them. J.A. 53, 97, 131, 135, 165. Although Peaches had just left to go to the store, the officers spoke to her by phone and she confirmed that she had invited Respondents to her party. J.A. 53-54, 165. The landlord of the house was not at the party, and the guests did not know the landlord's name. J.A. 53, 67.

Both Petitioners and the Government entirely ignore the applicable standard in their qualified immunity analysis, however. *See* Br. 42-50; Br. of United States 22-32. In recounting the facts, they repeatedly rely on incredible or contradicted evidence, seeking to cast the evidence in the light most favorable to them at every turn. But there are a number of genuine, material disputes of fact relevant to the qualified immunity inquiry. Indeed, Respondents have compelling bases to question the credibility and accuracy of the investigating officers'

assertions regarding what they perceived and did at the house, as well as before they arrived. In reviewing the denial of qualified immunity to Petitioners, the Court must disregard this dubious evidence.

First, Petitioners claim someone received a tip about the house. J.A. 112. That evidence should be disregarded on Petitioners' motion, however, because there are multiple reasons to doubt the tip was ever given or received. The only evidence about the tip comes from people without personal knowledge of it. *E.g.*, J.A. 94, 98-99, 112, 131. No one described personally receiving the tip, nor the circumstances in which the tip was received. And no documentary evidence corroborates that the tip was ever given. There is no transcript of a call to the police, no letter from a concerned citizen, no police report contemporaneously documenting the tip by the person who supposedly received it. [4] While Respondents cannot offer affirmative evidence disproving the tip—because evidence as to the tip is necessarily in the possession of Petitioners alone—they have identified a number of reasons that they should be permitted to cross-examine Petitioners about the tip at trial. There is thus a genuine dispute about whether the alleged tip was ever actually given to the police. *See, e.g.*, *Thomas v.*

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[4] Instead, the record contains a declaration from someone named Randy Keck and an undated police report concerning someone named Walters. C.A. App. 85, 132. These documents, which allege neither "illegal activities" and loud noise, nor that the house was vacant at the time of the arrests, provide no evidentiary support for the alleged tip. *Id.*

Great Atl. & Pac. Tea Co., 233 F.3d 326, 331-32 (5th Cir. 2000); *S.E.C. v. Koracorp. Indus., Inc.*, 575 F.2d 692, 699 (9th Cir. 1978).

Second, Petitioners say Respondents fled when police arrived at the house. But the only officer who testified that Respondents "scatter[ed]" when police entered the house (Espinosa) also admitted that he was one of the last officers to enter the house, and that the partiers voluntarily opened the door when police knocked. J.A. 143. Moreover, another officer testified that he did not see anyone scatter when he entered, J.A. 85, and a third testified that everyone was sitting in the living room when he arrived, J.A. 51-52. Another officer asserted that someone was found hiding in a closet, J.A. 177, but not a single other officer corroborated that account, and one of the partiers contradicted it, J.A. 48-50. There is therefore a genuine dispute as to whether anyone fled or hid from the police.

Third, Petitioners contend that Respondents were smoking marijuana in the house. But the police never recovered marijuana in the house—despite looking all over for it. J.A. 81, 97. There is a genuine dispute, therefore, as to both the credibility of individual officers' testimony that they smelled marijuana and the accuracy of any such impressions.

Fourth, Petitioners claim that, despite first asserting that she had permission to be in the house, Peaches ultimately admitted that she did not. But Peaches supposedly admitted this lie to only a single officer, Detective Sepulveda. J.A. 53-54. Another officer, Sergeant Andre Suber, said he spoke to Peaches a number of times, and during their

conversations Peaches asserted that she did have permission to be in the house. *Id.* A third officer, Parker, attested to a conversation with Peaches that was similar to Suber's. J.A. 100, 165-66. Peaches also supposedly gave the police the landlord's phone number. J.A. 105. It would make little sense for Peaches to suddenly change course and admit—to a single person—that her entire story was a lie; if she felt cornered, she could have simply stopped answering the police's calls. In addition, the police did not memorialize *any* of their supposed conversations with Peaches. Sergeant Suber put nothing in writing about the exchanges, J.A. 55, and the police report about the night's event is conspicuously silent about all communications with Peaches, J.A. 112. There is thus a genuine, material dispute about the credibility of Sepulveda's story about his call with Peaches.

Finally, Petitioners assert that the landlord, Hughes, told an officer that Peaches and Respondents did not have his permission to be in the house. But only one officer, Parker, reported talking to Hughes, J.A. 99-100, 165-66, and Parker's credibility is sharply disputed. Indeed, the arrest report states that Parker recovered narcotics from the house—suggesting that Parker reported the same to his colleagues. J.A. 112. But Parker admitted that this was false; no drugs were found. J.A. 97; *see also* J.A. 81. Parker also testified that there was "no furniture in the house," J.A. 97, despite the unrebutted evidence of furniture throughout the house, *e.g.*, J.A. 41. Moreover, the police report about the evening lacks any mention of Parker's supposed conversation with Hughes, even though the report

includes much detail about other events. J.A. 112. There is a significant and genuine dispute, therefore, whether Parker ever had such a conversation with Hughes.

On Petitioners' motion for summary judgment, all of these factual disputes must be resolved in favor of Respondents. *Tolan*, 134 S. Ct. at 1866. And without these disputed facts, Petitioners plainly lacked probable cause to arrest.

2. The Police Had Affirmative Evidence of Respondents' Innocent Mental State.

The police lacked probable cause that Respondents committed unlawful entry because they had affirmative evidence of Respondents' innocent mental state and no evidence refuting it. Respondents made unrebutted, corroborated statements indicating a lawful state of mind, and these statements negate any probable cause the police might have otherwise had.

Respondents' statements were affirmative evidence of innocence. They "admitted that they were social guests" at the house, J.A. 105, and then explained that the host of the party, Peaches, had invited them to the house. J.A. 36, 53, 97, 131, 135, 165. Peaches independently confirmed the same. J.A. 53. There was no evidence suggesting that Respondents' statements might not have been true; indeed, Petitioners did not question their veracity at any other stage of this case. Because all of the evidence before the police showed that the host of the party had invited Respondents to the house, and because this evidence was not only unrebutted but

corroborated, the police lacked evidence that Respondents knew or should have known they were in fact unwelcome.

Petitioners claim that the police can categorically discredit suspects' statements, and thus that the police could disregard what Respondents and Peaches told them. That is incorrect. The probable cause analysis asks how a "reasonable" or "prudent" officer would view the evidence before him. *Gerstein v. Pugh*, 420 U.S. 103, 111 (1975); *Adams v. Williams*, 407 U.S. 143, 148 (1972); *Carroll v. United States*, 267 U.S. 132, 162 (1925). And that depends on the quality of the particular evidence before him—not on categorical rules.

For example, a prudent officer could certainly discredit a suspect's assertion that he didn't "know how the loaded gun got under [his] seat." Pet. App. 126a. The officer could take note of the strong circumstantial evidence to the contrary: The gun was under the suspect's own seat, and it is unlikely he would be unaware of something in such proximity to him and under his control. Faced with that factual tension, the officer could reasonably doubt the veracity of the suspect's self-serving statement and therefore discredit it.

Similarly, an officer could reasonably discredit a parent's assertion that she "didn't realize the under-aged high schools kids in [her] basement had a keg." *Id.* The officer could consider the evidence that she did know: The kids were in her basement, and they had to get an entire keg (which they were too young to buy themselves) down there. An officer reasonably might disbelieve the parent's statement.

Here, in contrast, there was no reason for the police to discredit the partygoers' statements. There was nothing about where they were, what they were doing, or the content of their statements that suggested they were lying. Respondents were indeed at a party that someone was hosting; someone had let them into the house (the front door was intact); and Peaches confirmed that it was she who invited them.

In such circumstances, where there is no reasonable basis for discrediting Respondents' statements, the police must take them into account. *See Guzell v. Hiller*, 223 F.3d 518, 520 (7th Cir. 2000) ("[p]olice must act reasonably on the basis of what they know," and "if what they know" includes information that calls into question probable cause, "they can't close their eyes to th[at] additional information"); *Gardenhire v. Schubert*, 205 F.3d 303, 318 (6th Cir. 2000) (officers cannot look only at evidence of guilt and ignore claim of innocence). And taking Respondents' statements into account, there was no basis for the police to conclude that Respondents knew or should have known that they were in the house against the owner's will.

3. The Police Had No Evidence That Respondents Had a Guilty Mental State.

Even if police officers could categorically discredit a suspect's statement, Petitioners' motion for summary judgment was nonetheless correctly denied. Probable cause requires affirmative evidence that someone has committed a crime. Thus, here, probable cause requires the *presence* of evidence that Respondents *had* knowledge that they were in the house against

the owner's will. That is different from the *absence* of evidence showing Respondents *lacked* knowledge. In other words, the police must identify inculpatory evidence of some kind; they cannot rely exclusively on rejection of Respondents' exculpatory evidence.

Accordingly, even if Petitioners could properly discredit Respondents' assertions of innocence, all this means is that Petitioners could disregard those statements in the probable cause analysis. The probable cause inquiry simply becomes: Setting aside Respondents' statements to the police, did the officers have affirmative evidence from which to conclude that they knew or should have known they were unwelcome? Or said another way, imagining that the police had arrested Respondents without ever talking to them, did the police have evidence to establish the knowledge element?

The answer is clearly no. When police happen upon a house party, they may not assume that the guests showed up uninvited and then arrest them for unlawful entry—absent affirmative evidence of guilt. This remains the case when not all the guests were invited directly by the host. It remains the case when the host's landlord is not invited to the party, and when the guests do not know the landlord's name. And this remains the case when the guests are drinking and dancing with strippers. Without affirmative evidence suggestive of unlawful entry, the police lack probable cause to arrest.

Here, Petitioners had no such evidence. None of the evidence on which they rely shows that Respondents knew or should have known they were at the party against the landlord's will.

a. Petitioners point to a number of "clear signs" that supposedly put Respondents on notice that they were trespassing: There were many guests, the party was late at night, there were "illicit activities," and some guests said they were invited by other guests. But those facts have nothing to do with trespassing. They are standard features of typical house parties—at least in some communities. These "signs" in no way suggest that Respondents knew (or should have known) their entry was unauthorized.

House parties are common in communities across the country—from college campuses to homes in the District of Columbia. *E.g.*, Benjamin Freed, *DC Sues Owner of Airbnb House Often Used for Parties*, Washingtonian, May 8, 2015, *available at* http://goo.gl/aDbYH1; 30 & Over House Party & Cookout Crew, http://goo.gl/VFYjwj; Washington, DC House Party Events, Eventbrite, http://goo.gl/Uuto2A; Erica Avesian, *A Freshman Girl's Guide to Frat Parties*, http://goo.gl/xc4VWd. These parties are often big. They may be raucous and last until late. They often involve alcohol, and sometimes even strippers. *E.g.*, Eric Levenson & Arit John, *How the Kids Do It Now: Partying*, The Atlantic, Apr. 9, 2014, *available at* http://goo.gl/2DmB7w; *Strippers Said to Be Commonplace At Football-Recruit Parties*, Fox News, Feb. 10, 2004, *available at* http://goo.gl/eYmuX5. Frequently, invitees extend the invitation to their friends, who extend the invitation to their friends. David Brunow, et al., Throwing a House Party 3, *available at* http://goo.gl/VKa66u ("Using a list is not usually an option at a typical house party, in which friends tell friends ....").

But typically, guests at house parties are in fact authorized to be there. The host invites her friends, and then implicitly or explicitly gives invitees permission to extend the invitation further. *E.g.*, How to Throw an Amazing College Party, WikiHow, http://goo.gl/Gp8djD ("If you are hoping to have lots of people at your party, then you might consider telling all of your friends to bring someone along."); How to Get Invited to a Party, WikiHow, http://goo.gl/3FboMQ ("In most cases it is generally accepted for invited guests to bring a 'plus one' to a big to-do."); Debby Mayne, *How to Host an Open House Party*, The Spruce, Jan. 30, 2017, http://goo.gl/CFTB5c ("It's also a good idea to expect more people than you invited to show up.").

The same is true here. There were many people at the party. It was debauched and went until late. There was alcohol, and there were strippers. The host invited some of the guests, who in turn invited others. These facts do not distinguish the house party here from any other. There was thus no basis to assume that, unlike other house parties, the guests here were unwelcome.

Moreover, even if Respondents' conduct was not typical house party behavior, it is certainly not suggestive of knowing trespass. There is no basis to conclude, for example, that trespassers are more likely to attend parties involving strippers than non-trespassers, or that they are more likely to drink alcohol, or that they are more likely to party late. These "illicit activities" take place all the time, including in private homes. *E.g.*, National Institute of Health, Alcohol Facts and Statistics, *available at* http://goo.gl/VUQqy1 ("According to [a 2015 survey],

86.4% of people ages 18 or older reported that they drank alcohol at some point in their lifetime; 70.1% reported that they drank in the past year; 56.0% reported that they drank in the past month."); Stripper, Wikipedia, http://goo.gl/8yQigV ("Private parties are popular events for which to hire strippers."). However bawdy Respondents' conduct may have been, it is a *non sequitur* to conclude that this behavior made it more likely that they knew or had reason to know they were present against the owner's will.

b. Petitioners also contend that they could infer Respondents' guilty state of mind because neither Peaches nor the owner of the house was present when police arrived. Br. 18. Not so. As for Peaches, she explained to the police that she had left the house to go to the store just before they arrived. J.A. 165. Nothing about that is suspicious. And as for the landlord, there was no reason that the partiers would expect him to be at the party. Landlords of rental homes often live offsite. So for parties in rental homes (just as for parties in college dormitories), no guest would be surprised if the "owner" were neither the host nor an invitee.

Nor is it suspicious, as Petitioners and the Government contend, that the party guests did not know who the "owner" of the home was. Guests at a party have no reason to inquire whether their host is an owner or a renter, and they certainly have no reason to inquire further about the name of a renter's landlord. It is the rare social guest who would demand to know the private details of her host's housing arrangements. Ignorance of those details is not evidence of trespass.

c. Petitioners and the Government further point to Respondents' allegedly "incomplete and inconsistent" responses to the police: Some partiers reported that Peaches had invited them to the party, and some reported that they had been invited by others. But as discussed above, guests at house parties are often explicitly or implicitly permitted to extend the invitation further, or to bring along a plus-one. *See supra* at 35-36. There is nothing inconsistent, incomplete, or even unusual about the partiers' representation that some guests were invited directly by the host and others received the invitation secondhand. *See, e.g.*, *Mitchell*, 841 F.3d at 75.

d. Petitioners also claim that the house was "vacant," and that the vacancy creates probable cause of Respondents' unlawful mental state. Although Petitioners never make clear what they mean by "vacant," their argument fails under any definition.

To the extent Petitioners mean that the house was empty, they are simply wrong in premise. As the evidence demonstrates, there were a number of chairs in the living room and there was a mattress in the bedroom. J.A. 41, 96. There were lights on, J.A. 52, candles put out, J.A. 96, and shades on the windows, C.A. App. 82. The electricity and plumbing were working normally. J.A. 45, 52.

To the extent that Petitioners instead mean that no one was living in the house, that is beside the point—though in fact the record suggests that Peaches was living there, J.A. 41. What matters for purposes of Respondents' state of mind is what was *apparent* (or should have been apparent) to them.

And what was apparent to Respondents is that the house was furnished, and secured with a lock and key, just like any other house. *Id.* Nothing about the house should have alerted Respondents that no one lived there; it was not boarded up, there was no for-sale sign out front, and there was no stay-out sign posted. *Cf. Culp*, 486 A.2d at 1176.

Apparently acknowledging as much, Petitioners also assert that the sparseness of the furnishings should have put Respondents on notice that their presence in the home was unwanted. But Petitioners simply overlook the reality of how many Americans, and many residents of the District of Columbia in particular, live.

The house in this case was located in the River Terrace neighborhood of the District, where the poverty rate around the time of the party was 29% and the unemployment rate was 10%—well above the rates across the District as a whole. Neighborhood Info DC, DC Zip Code Profile—Well-Being. http://goo.gl/AcRKT3. Under-furnished homes in poor communities like River Terrace are extraordinarily common. *See, e.g.*, Laura Klairmont, *Tackling Poverty in Nation's Capital, One Bed at a Time*, CNN, Apr. 21, 2015, http://goo.gl/nRhYdn (many apartments in the District have "nothing but a chair"; people "stor[e] their clothes in plastic garbage bags" and lack tables on which "to eat their meals"). Indeed, the median household expenditure on furnishings in River Terrace is only 69% of the national average. Consumer Spending in River Terrace, Point2Homes, http://goo.gl/MUqiQQ.

Compounding the problem are rising housing costs throughout the District, in part due to gentrification in other neighborhoods. As a result of "rising housing costs, stagnant or falling incomes, and a shortfall of federal housing assistance," "eviction has become commonplace in low income communities." Matthew Desmond, *Unaffordable America: Poverty, Housing, and Eviction*, Fast Focus, Mar. 2015, *available at* http://goo.gl/trbrgf. This means that low-income households in the District move frequently, which in turn increases the costs and difficulties of settling into and furnishing a home. *See* Paul Duggan, *Study: D.C. Gentrification Can Cause Pockets of Poverty to Grow, Especially East of Anacostia River*, Wash. Post, Nov. 23, 2016, *available at* http://goo.gl/KHJHiY.

Thus, even if inexpensive furnishings might, in other communities, be sufficient to put partygoers on notice that the house was unoccupied, it was insufficient here. The partygoers would have been aware only that the party host, like many of her neighbors, had been unable or unwilling to invest significantly in furniture yet—possibly because she had just moved in or possibly because she was one of the unlucky 29% of residents living in poverty.

The case on which Petitioners rely, *Culp*, is thus inapposite. 486 A.2d 1174. In that case, which involved an empty *and* unoccupied home in disrepair, the appellant argued that, because the house appeared abandoned, he had no reason to think he had entered without the owner's consent. *Id.* at 1175. That is, he was using the home's vacancy to *excuse* his presence, not to *condemn* it. Anyway, the Court simply disagreed that the house appeared abandoned; the property revealed "indications of a continued

claim of possession by the owner or manager" (boarded-up windows), and thus the appellant should not have assumed the house was abandoned. *Id.* at 1177. Because, as discussed above, the house here appeared neither empty nor unoccupied, *Culp* says nothing about what Respondents knew or should have known.

The same is true of the unlawful-entry statute's provision about prima facie evidence: "The presence of a person in any private dwelling . . . that is otherwise vacant and boarded-up or otherwise secured in a manner that conveys that it is vacant and not to be entered . . . shall be prima facie evidence that any person found has [committed unlawful entry]." D.C. Code § 22-3302(a)(1). Because the house here was not vacant, boarded up, or secured in any other way that suggested vacancy, this statutory provision plays no role here.

In short, none of the evidence properly considered on review of Petitioners' motion for summary judgment suggests that Respondents knew or had reason to know they were unwelcome at the home. Instead, it simply shows that they attended a typical, if licentious, house party in a low-income neighborhood. It should have been clear to a reasonable officer, therefore, that he lacked probable cause to arrest Respondents.[5]

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[5] Even if Petitioners were entitled to qualified immunity with respect to the § 1983 claim, this does not necessarily imply they have a common-law privilege against Respondents' common-law claims. Unlike qualified immunity, immunity under the common law turns on a "subjective test," *i.e.*, whether "the officer had a reasonable good faith belief that his or her conduct

D. Petitioners Distort the Qualified Immunity Inquiry.

An officer cannot claim qualified immunity when "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001). Petitioners are not entitled to qualified immunity because it would have been clear to any reasonable officer in their shoes that he could not arrest Respondents. That officer would have known that (1) probable cause requires at least some evidence on every element; (2) the District of Columbia crime of unlawful entry had a *mens rea* element; and (3) he lacked any evidence on that *mens rea* element. Petitioners, joined by the Government, resist this conclusion by distorting the qualified immunity inquiry in three ways.

First, Petitioners and the Government contend that qualified immunity is so broadly available that Petitioners may hide behind it unless Respondents can point to a specific case that prohibited an arrest under D.C. law on identical facts. That is, Petitioners claim that they are immune from suit unless there was a case establishing that "the

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(continued...)

was lawful." *Liser v. Smith*, 254 F. Supp. 2d 89, 96 (D.D.C. 2003); *see also Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982). To resolve the common-law privilege issue, therefore, the factfinder must first determine each officer's subjective belief at the time of the arrests; only then can the question whether each officer possessed a "reasonable good faith belief" be resolved. Absent affirmance, that is a question for remand.

circumstantial evidence *in this case* was insufficient" to support a finding of probable cause. Br. 44 (emphasis added); *see also* Br. of United States 25. This argument is foreclosed by this Court's prior express rejection of any requirement "that the facts of previous cases be 'materially similar' to [the present] situation." *Hope*, 536 U.S. at 739. Officials need only have "fair warning" that their conduct was unconstitutional. *Id.* at 741. They can thus be on notice their conduct violates established law "even in novel factual circumstances." *Id.* This Court has never required that there be an existing case identical in its minute particulars to the facts at issue.

Second, Petitioners and the Government argue that they are entitled to qualified immunity because "it was not clearly established that an on-scene officer had to accept a suspect's claim of an innocent mental state when reasonable grounds existed to doubt the claim's credibility." Br. 45; *see also* Br. of United States 29. As an initial matter, even if this argument were correct, it would not get Petitioners anywhere. The officers lacked a factual basis to arrest even if they reasonably could have disregarded Respondents' statements. *See supra* Part I.C.3.

In any event, this argument attacks a straw man. Of course police officers are permitted to doubt a suspect's explanation when those doubts fairly arise from their observations and the information available to them. *See Figueroa v. Mazza*, 825 F.3d 89, 102 (2d Cir. 2016). And when other evidence available to the officers supports a finding of probable cause, officers are entitled to arrest notwithstanding a claim of innocence. *See Finigan v. Marshall*, 574 F.3d 57, 60-

63 (2d Cir. 2009) (police officers had probable cause to arrest given that suspect had surreptitiously entered house, a report of burglary had been made, and owner had changed locks); *Wright v. City of Phila.*, 409 F.3d 595, 603 (3d Cir. 2005) (police entitled to disbelieve suspect who broke window to enter house when explanation was not credible). Respondents have never suggested otherwise.

Respondents' point is that, here, there were *no* grounds to doubt their credibility—all evidence in fact corroborated their statements—and thus the law was clear that there was no probable cause to arrest them. Indeed, it is well established that officers are not entitled to simply discredit an explanation that "so thoroughly and reliably accounted for the officers' earlier suspicions that it negated any reasonable belief that probable cause existed." *Figueroa*, 825 F.3d at 102. Put another way, officers are not entitled to qualified immunity when "the facts establishing [a] defense were so clearly apparent to the officers on the scene as a matter of fact, that any reasonable officer would have appreciated that there was no legal basis" to arrest. *Garcia v. Does*, 779 F.3d 84, 93 (2d Cir. 2015). Any contrary rule would give police license to arrest citizens engaged in innocent conduct and then justify the arrest after the fact through the bare assertion that they found the suspect not to be credible.

Third, Petitioners and the Government make a similar error when, relying on a series of trespassing and similar cases, they assert that the law was at a minimum unclear as to whether police could arrest trespassers notwithstanding their innocent explanations. Br. 45-47; *see also* Br. of United States

26-27. In each of the cited cases, there was evidence that the trespassers knew or should have known they were present against the will of the owner, so their self-serving statements were properly discredited. Analogizing to those cases improperly assumes that here too there was evidence undermining Respondents' statements that they had been invited to the house by Peaches. And as discussed above, that is not the case.

To reiterate, Respondents *agree* that officers are not required to accept a suspect's self-serving explanation in the face of evidence that the suspect has entered a dwelling against the express or implied will of its owner. *See Kozlovska v. United States*, 30 A.3d 799, 803 (D.C. 2011) (suspect claimed to have permission to be in building but was the subject of order barring entry); *Artisst*, 554 A.2d at 327 (suspect's innocent explanation was cast in doubt by a prominently-posted warning requiring that identification be shown to security guard); *McGloin*, 232 A.3d at 90-91 (suspect's stated explanations for wandering on roof of building were contradictory and lacked any corroboration). And Respondents *agree* that, in other contexts as well, police may discredit a suspect's explanation when the circumstances permit an inference of wrongful intent. *See Tillman v. Wash. Metro. Area Transit Auth.*, 695 A.2d 94, 96 (D.C. 1997) (officers arresting suspect for entering Metro station without paying could infer intent from her act of walking past the farecard machines into a restricted area); *Nichols v. Woodward & Lothrop, Inc.*, 322 A.2d 283, 285 n.2 (D.C. 1974) (arresting officer not required to accept explanation for taking and hiding sweater for which suspect did not pay); *Prieto v. May*

Dep't Stores Co., 216 A.2d 577, 578 (D.C. 1966) (shoplifter's explanation that she had "forgotten" that she had the stolen merchandise was uncorroborated).

But whether there was in fact any evidence warranting an inference of *mens rea* depends on the circumstances of the case, and in these circumstances there was none. In the absence of any conflicting evidence demonstrating that Respondents knew or should have known they were present against the will of the owner—*i.e.*, that they were explicitly or implicitly warned not to enter *before* their arrest—a reasonably prudent officer could not discredit Respondents' statements.[6]

E. Petitioners' Reliance on Their Superiors' Order Was Not Objectively Reasonable.

Finally, Petitioners Parker and Campanale claim they are entitled to qualified immunity because they acted at their superior's direction. That argument, however, fails for the same reasons as Petitioners' other arguments.

An officer may rely on another's determination of probable cause to make an arrest, but the officer's "reliance ... must be objectively reasonable for him to be clothed with qualified immunity." *Barham v.*

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[6] Petitioners and their *amici* urge that reversal of the judgment below is necessary to avoid a rule that will unduly constrain law enforcement agents. *See* Br. 35-36; Br. of United States 21-22, 31-32: Br. of Utah et al. 12-14; Br. of Nat'l Ass'n of Counties et al. 4-17. But in light of the parties' agreement that officers may disregard a suspect's claim of innocence where the facts and circumstances support doing so, this claim is overblown. Again, at bottom, this case simply entails a dispute over what inferences are permissible on one particular set of facts.

Salazar, 556 F.3d 844, 850 (D.C. Cir. 2009) (Henderson, J., concurring). Campanale and Parker cannot show it was objectively reasonable to rely on their superior's arrest order because they should have known there was insufficient cause to arrest. They were involved in the investigation at the house, they observed the relevant facts, and they learned firsthand that Peaches had invited Respondents to the house. Pet. App. 78a-79a. Qualified immunity is therefore unavailable.

II. RESPONDENTS' MOTION FOR SUMMARY JUDGMENT ON PROBABLE CAUSE WAS CORRECTLY GRANTED.

For the reasons discussed above, Petitioners lacked probable cause to arrest Respondents unless they had at least some evidence that Respondents knew or should have known they were present in the house against the will of the owner. *See supra* Part I. Petitioners had no such evidence.

Even when the record is viewed in the light most favorable to Petitioners, as is appropriate on review of Respondents' summary judgment motion, there was no evidence that Respondents knew or should have known they were present against the owner's will. In this posture, the Court may properly take as true some additional evidence: Several officers said an unidentified person received a tip that there were illegal activities and loud noise in the house, and that it was vacant, J.A. 94, 112; one officer said he saw some partiers scatter when the police arrived at the house, J.A. 143, and another officer said he found someone hiding in a closet, J.A. 177; some officers said they smelled marijuana in the house, J.A. 97,

131; one officer (Sepulveda) stated that Peaches admitted she had lied when she said she had permission to be in the house, J.A. 54; and one other officer (Parker) stated that he had spoken to Hughes, who had told him that, because his lease negotiations with Peaches stalled, Peaches lacked permission to be in the house or invite others in, J.A. 99-100, 166. None of this evidence moves the needle on probable cause, however. Accordingly, Respondents' motion for summary judgment on liability was properly granted.

A. Parker's Conversation With Hughes Is Not Probative.

Petitioners argue that Parker's alleged conversation with Hughes alone proves that Respondents knew or should have known they were present against the owner's will. According to Petitioners, the conversation permitted police to conclude that Respondents lacked permission to be in the home, and police may infer a culpable mental state *whenever* someone enters a private home without the permission of the owner. Such a categorical rule is unsupported by precedent, and it is wrong. In these circumstances, Parker's report of his conversation with Hughes is in no way probative of Respondents' state of mind.

1. This Court should reject the ill-fitting categorical rule Petitioners propose. As Petitioners themselves point out, bright-line rules are inappropriate in the probable cause context. Br. 15 ("The Court consistently rejects . . . 'rigid rules, bright-line tests, and mechanistic inquiries . . . .'" (quoting *Harris*, 568 U.S. at 244)). The inferences an officer may reasonably draw about a suspect depend

on the particular circumstances he confronts, and thus probable cause is necessarily a fact-sensitive inquiry. *Henry*, 361 U.S. at 102.

That is no less true here. No doubt, there are many circumstances in which the police may appropriately arrest someone who is in a private house without the consent of the owner. Say, for example, the police respond to a house alarm to find a man with a crowbar, his pockets laden with jewelry, and the owner declares the man a thief. The police plainly have cause to arrest. But that is not so in other cases. Suppose a couple has a fight and both spouses tell police that the other is there without permission. Or suppose an owner reports to the police that a young child, or an old woman with apparent dementia, wandered through his open door. It would not be reasonable for the police to arrest every one of these people for knowing trespass, at least without further investigation.

Petitioners' proposed rule is even more inappropriate in a landlord-tenant context, where the "owner" is not the one who lives in the home, as here. Social guests may not know—and should not be expected to know—the details of their hosts' leasing arrangements. Has the host overstayed her lease? Has she fallen behind on the rent? Is the lease actually in someone else's name? In each of these cases, the "owner" might report that the host—and by extension, the host's guests—lacks permission to be in the home. But the guests would have no idea this was the case, and no reason to think it might be.

Petitioners' cases only prove the point: In certain cases, the evidence available to the police may create

probable cause (or even proof beyond a reasonable doubt) of a crime. *E.g.*, Br. 18 (citing *United States v. Mousli*, 511 F.3d 7 (1st Cir. 2007) (evidence that counterfeit currency was found next to defendant's printer, that one bill was incomplete, and that there were a significant quantity and variety of bills was legally sufficient to prove counterfeiting)). But in other cases it may not. *Id.* (citing *United States v. Aguilar*, 515 U.S. 593 (1995) (evidence that defendant lied to investigating agent was insufficient to prove he intended to obstruct a judicial proceeding)). The upshot is that the inferences that reasonably may be drawn depend on the particulars.

2. Here, the particulars do not show that Respondents had an unlawful state of mind. As it turned out, although their party host had begun lease negotiations with the landlord, those negotiations had gone sour. J.A. 99. But Respondents had no reason to know that. Social guests, like Respondents, do not generally inspect their host's lease before setting foot inside a rental unit. Nor should they be expected to. Attending a party cannot give rise to criminal liability whenever the host overstays her lease or fails to pay the rent on time. The fact that Respondents' host turned out not to have reached a valid rental arrangement with her landlord thus does not provide a basis to infer that every partygoer knew or should have known that.

B. The Alleged Tip Is Not Probative.

The evidence about the supposed tip the police received does not advance the ball either. The tipster allegedly reported "illegal activities" going on inside the house. J.A. 112. But such vague and generalized

assertions of unlawful conduct are "practically meaningless" in the probable cause inquiry. *Henry*, 361 U.S. at 103; *accord Beck v. Ohio*, 379 U.S. 89, 94 (1964) (an officer's testimony "that he had 'information,' that he had 'heard reports,' [and] that 'someone specifically did relate that information'" did not support a finding of probable cause to arrest); *Recznik v. City of Lorain*, 393 U.S. 166, 169–70 (1968) (probable cause to arrest requires more than "the mere fact of an assertion by an informer").

Moreover, the tip was shown to be wrong. To have any weight in the probable cause inquiry, the informant's statement must be particularized *and* bear some indicia of reliability or corroboration to support probable cause. *See, e.g.*, *Massachusetts v. Upton*, 466 U.S. 727, 734 (1984) (per curiam). Yet the officers found no evidence of "unlawful activities" in the house. J.A. 67, 86, 98. The tip thus did nothing to establish probable cause of any crime generally, let alone unlawful entry specifically. *E.g.*, *Whiteley*, 401 U.S. at 567; *Jurkowitsch v. Choudhury*, 673 F. App'x 44, 46–47 (2d Cir. 2016) (no probable cause for unlawful entry where officer's observations contradict, rather than confirm, informant's statements).

The tipster also supposedly told the police that there was loud noise coming from the house and that the house was vacant. J.A. 94, 112. But talking or playing music loudly is neither illegal itself nor evidence of another crime, and as soon as the police arrived they could see the house was not vacant, *see supra* at 38-41. Again, the tip does nothing to help Petitioners establish probable cause.

C. Respondents' Alleged Flight Is Not Probative.

Petitioners and the Government contend that Respondents' alleged flight when the police arrived at the house is probative of their knowledge, because it supposedly revealed Respondents' "consciousness of guilt." Not so under these circumstances. "[D]eliberatively furtive actions and flight at the approach of . . . law officers" can, when "coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime," be considered in the decision to make an arrest. *Sibron v. New York*, 392 U.S. 40, 66-67 (1968). But even headlong flight "is not sufficient standing alone" to create reasonable suspicion, let alone probable cause. *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000). And flight is nothing more than "ambiguous" when there is an explanation for the suspect's actions. *Wong Sun*, 371 U.S. at 482.

African-Americans, like Respondents, are often distrustful of the police. *See, e.g.*, Rich Morin & Renee Stepler, *The Racial Confidence Gap in Police Performance*, Pew Research Center, Sept. 29, 2016, http://goo.gl/GNnLYr. The police are significantly more likely to use force against African-Americans, even when racial disparities in crime rates are taken into account. *See, e.g.*, Timothy Williams, *Study Supports Suspicion That Police Are More Likely to Use Force on Blacks*, N.Y. Times, July 7, 2016, at A16, *available at* http://goo.gl/XvYNrN. In the District of Columbia, African-Americans are 50% more likely to file complaints against the police. Theresa Vargas & Kimbriell Kelly, *"It Made Me Hate the Police": Ugly Encounters with Officers Fuel Loss of Trust, Costly*

Payouts, Wash. Post, Jan. 8, 2017, at C05 *available at* http://goo.gl/4fbM6S. And their complaints are often meritorious; in the years since 2005, the District has paid at least $31.6 million in damages in 173 cases alleging police misconduct, false arrest, and excessive use of force. *Id.* This disparate treatment of African-Americans means that their flight is often "totally unrelated to consciousness of guilt." *Commonwealth v. Warren*, 58 N.E. 3d 333, 342 (Mass. 2016); *see also id.* ("[T]he finding that black males . . . are disproportionately and repeatedly targeted . . . suggests [flight] might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity.").

The particular circumstances here would have exacerbated any fear that Respondents felt. The police arrived at the house in droves in the middle of the night. J.A. 133, 155; C.A. App. 65. After knocking "heavily" on the door, C.A. App. 65, they raided the house with their guns drawn, J.A. 47-48, 50. It is thus entirely unsurprising that some of the partygoers would respond fearfully. The police should have expected as much, and could not reasonably have concluded that the partygoers' fear indicated that they knew they were trespassing.

Moreover, not everyone responded the same way to the police. Many of the partygoers remained where they were; one let the police in. J.A. 143. Even if the alleged flight of a handful of individuals gave the police a reason to believe those people knew they were present without the consent of the owner, that hardly gave Petitioners the requisite "suspicion that the *particular* individual[s]" who behaved otherwise

were guilty of a crime. *United States v. Cortez*, 449 U.S. 411, 418 (1981) (emphasis added); *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979).

D. Respondents' Alleged Marijuana Use Is Not Probative.

Petitioners' evidence that officers smelled marijuana in the house is similarly irrelevant to Respondents' state of mind. Marijuana use is extraordinarily common in this country, and in the District of Columbia specifically. Indeed, "[t]here are almost as many marijuana users as there are cigarette smokers in the U.S." Christopher Ingraham, *11 Charts That Show Marijuana Has Truly Gone Mainstream*, Wash. Post, Apr. 19, 2017, http://goo.gl/1hQaKw. In the District of Columbia, more than half the city's residents have tried marijuana, and more than 17% currently use it. Government of District of Columbia, Marijuana in the District of Columbia 6, *available at* http://goo.gl/K9ZB7H. Moreover, there is no empirical basis to conclude that marijuana use is correlated with unlawful entry, and there is no logical reason to believe it might be. Petitioners cannot construct probable cause for unlawful entry with evidence that the house smelled of marijuana.

E. Peaches' Alleged Admission Is Not Probative.

Detective Sepulveda's testimony that Peaches supposedly admitted to police that she lacked permission to be in the house is not probative of Respondents' knowledge either. There is no evidence that Peaches made the same admission to Respondents. And the fact that police were

supposedly able to extract information from Peaches after repeated questioning does not suggest that Respondents obtained the same information. Guests at a house party do not typically interrogate their host about her leasing arrangements.

Nonetheless, Petitioners now claim, for the first time in this litigation, that because Peaches reportedly lied to the police about whether she had permission to be in the house, Respondents' statements about her invitation are somehow affirmative proof of their guilty state of mind. As an initial matter, Petitioners failed to raise this dubious argument in any lower court or in their petition for certiorari. The argument thus comes too late, and the Court should not consider it. *Ortiz*, 422 U.S. at 898.

In any event, Petitioners' newfound argument fails on the merits. Petitioners' contention is that Peaches knew she lacked permission to be in the house, and Peaches was involved in a common enterprise with Respondents. Accordingly, they conclude, under this Court's opinion in *Pringle*, the police could impute Peaches' knowledge to Respondents. *Maryland v. Pringle*, 540 U.S. 366 (2003).

Petitioners misunderstand the import of *Pringle*. In that case, this Court held that the police could reasonably conclude that three men who were traveling together in a car full of cocaine and cash were involved in a common enterprise. *Id.* at 371-72. Given the circumstances (everyone was in the same small car in close proximity to the drugs, yet all denied knowledge of the drugs), the police could reasonably infer that "*any* . . . of the occupants had

knowledge of, and exercised dominion and control over, the cocaine." *Id.* at 372 (emphasis added). And, by extension, the police could also properly conclude that the three men *together* had knowledge and control of the cocaine—that is, that they were part of a common enterprise. *Id.*

Not so here. Unlike the three men in *Pringle*, Peaches and Respondents were not similarly situated. So even if the police had reason to think Peaches had committed a crime, they had no reason to think the same of Respondents. Unlike Peaches, Respondents never claimed to be the host of the party or the renter of the house, and they never backtracked from any of their statements. And unlike Peaches, they never admitted that they knew they were not allowed in. Under these circumstances, there is no basis to conclude that every *individual* was guilty of unlawful trespass. And thus there is no reason to conclude that everyone *together* was guilty of committing unlawful trespass either. Because there was no evidence of a common enterprise, Petitioners cannot use *Pringle* to avoid making an individualized probable cause showing for Respondents. *See Ybarra*, 444 U.S. at 91 ("[A] search or seizure of a person must be supported by probable cause particularized with respect to that person."). Thus even if Peaches' admission is evidence of her unlawful entry, it is probative of nothing as to Respondents.

In short, even viewing the facts in favor of Petitioners, the evidence shows only that Respondents attended a raucous house party, and engaged in raucous house-party activities, at the invitation of someone whose lease negotiations had stalled. That is not a basis to arrest for trespass.

Respondents' motion for summary judgment was therefore properly granted.[7]

* * *

Even if Respondents were not entitled to summary judgment, Petitioners surely are not either. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 129 (2001) (Breyer, J., concurring) ("To deny one party's motion for summary judgment . . . is not to grant summary judgment for the other side."). Yet Petitioners seek reversal not only of the lower court's grant of *Respondents'* motion for summary judgment but also of the denial of *their own* cross-motion. That is plainly improper in light of the factual record. If this Court does not affirm, it should remand for trial.

As already explained, there are a number of genuine, material disputes of fact that go to the existence of probable cause. *See supra* Part I.C.1. On Petitioners' motion for summary judgment on probable cause, all of these factual disputes must be resolved in favor of Respondents. *Tolan*, 134 S. Ct. at 1866. And without these disputed facts, the basis for

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[7] Petitioners and the Government allege one additional basis for probable cause: Some partygoers said they were attending a bachelor party, whereas others said they were attending a birthday party. Br. 4 n.2; Br. of United States 3. But the only evidence on this point was Officer Campanale's testimony during the trial on damages—*after* the summary judgment motions were resolved. *See* C.A. App. 372. No such evidence was before the district court at summary judgment. *See, e.g.*, J.A. 53, 131. Because review of the district court's resolution of summary judgment motions is "limited to the record presented to the district court at the time of summary judgment," Petitioners cannot rely Campanale's trial testimony here. *See Griffin v. Sirva Inc.*, 835 F.3d 283, 287 (2d Cir. 2016).

Petitioners' arrest is simply that: (1) Respondents were present at a licentious house party but did not rent or own the house themselves; and (2) the landlord was not present, and Respondents did not know his name. For the reasons discussed in Part I.C, *supra*, these facts do not amount to probable cause of unlawful trespass. Attending a party in a rental unit cannot possibly give rise to criminal liability whenever the tenant overstays her lease. Absent affirmance, this Court should remand for trial. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 668 (1994) (plurality).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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